

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MISSOURI  
EASTERN DIVISION

GREG IRVING, )  
                    )  
Plaintiff,       )  
                    )  
vs.               )       Cause No. 4:05 CV 2089 JCH  
                    )  
VAN WAGNER, et al., )  
                    )  
Defendants.       )  
\_\_\_\_\_ )

**MEMORANDUM AND ORDER**

This matter is before the Court on Defendants' Motions to Dismiss for failure to file a health care affidavit. This is a medical malpractice case arising out Plaintiff's wife's death while in the care of defendant health care providers.

Plaintiff filed his original petition in the Circuit Court of the City of St. Louis on August 27, 2005. (Notice of Removal, Doc. No. 1). Defendants removed to this Court on November 8, 2005 on the basis of diversity of citizenship. (Doc. No. 1). Defendants filed the instant Motions to Dismiss on November 22, 2005 and December 1, 2005. (Doc. Nos. 7, 8).

Defendants move to dismiss for failure to file a health care affidavit under Mo. Rev. Stat. § 538.225. (Doc. Nos. 7, 8). This provision requires the plaintiff in a medical malpractice tort action to file an affidavit from a health care provider stating that the defendant "failed to use such care as a reasonably prudent and careful health care provider would have under similar circumstances and that such failure to use such reasonable care directly caused or directly contributed to cause the damages claimed in the petition." Mo. Rev. Stat. § 538.225. If the affidavit is not filed within 90

days of the filing of the petition, and the Court does not find good cause for the failure, the Court must dismiss the claim without prejudice. *Id.*

Plaintiff's attorney responds that he underwent unexpected and serious surgery in November, and was thus unable to file the affidavit within the required time period. (Memorandum in Opposition, Doc. No. 30). He has also now filed the required affidavits. (Doc. Nos. 25, 26, 27). The Court finds this to be good cause pursuant to § 538.225, and denies Defendants' Motions to Dismiss.

The Court also notes that Plaintiff has requested an additional twenty days (Doc. No. 30) to file an Amended Complaint, in response to Defendants' Motion for a More Definite Statement (Doc. No. 9) and Motion to Plead Cause of Action in Separate Counts (Doc. No. 4). This request is granted.

Accordingly,

**IT IS HEREBY ORDERED** that Defendants' Motions to Dismiss (Doc. Nos. 7, 8) are **DENIED**.

**IT IS FURTHER ORDERED** that Plaintiff's Motion for Leave to File Affidavits Out of Time (Doc. No. 23) is **GRANTED**.

Dated this 12th day of January, 2006.

/s/ Jean C. Hamilton  
UNITED STATES DISTRICT JUDGE